

against them at that time, nor summoned he them at the first term, albeit he summoned others, who were then out of the country, against whom he then protested for an incident upon 60 days, at which time he made no mention of these, who were thereafter summoned after the second term.

No 174.

Act. Gibson.

Alt. Baird.

Clerk, Gibson.

Fol. Dic. v. 2. p. 190. Durie, p. 485.

*** Auchinleck reports this case :

At the last term of the incident, it is desired that the pursuer thereof may have letters to summon witnesses, upon 60 days, because it was *alleged*, that he was a necessary witness; to which it was *answered*, that seeing he did not condescend, at the first term, upon this witness, when he protested for lawful diligence, upon 60 days, against such as were out of the country, it was no reason the same should be granted now, at the last term. THE LORDS would not grant the desire of the pursuer of the incident.

Auchinleck, MS. p. 101.

1632. January 28. Laird of CADDELL against Lord LOVATT.

No 175.

AFTER the whole terms of an incident are run out, the user of the incident may not, for obtaining farther delay, refer the having of the writs to the party's oaths contained in the incident, and to the effect obtain a new day to summon them to give their oaths; which the Lords refused.

Auchinleck, MS. p. 101.

1632. July 4. BURNET against Lord BUCCLEUGH and SCOTT.

No 176.

IN an action of production pursued by John Burnet, fiar of Barns against my Lord Buccleugh and Laurence Scott, there being sundry exceptions proponed to be proved *scripto vel juramento partis*, they, for proving thereof, raised an incident, and the same being sustained, there was a day assigned for proving the incident; at which day, diligence is produced against the witnesses, and another day assigned for using farther diligence; at which second day, diligence being produced, the said John Burnet pursuer in the principal cause craves the term to be circumduced. To which it was *answered*, No circumduction can be granted, because they are now content to refer the having of the writs contained in the incident to the parties called in the incident, as alleged havers of these writs, their oaths of verity. It is *replied* by John Burnet,